Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

No. 01-518

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.

Respondents.

On Writ of Certiorari To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER

Maurice Baskin
Counsel of Record for
Petitioner
Karen L. Vossler
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

February 19, 2002

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Sixth Circuit err in holding that under *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 113 LRRM 2647 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors Inc. v. Columbia Picture Industries Inc.*, 508 U.S. 49 [61 USLW 4450] (1993).

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no other parties or subsidiary companies that are required to be listed pursuant to Supreme Court Rule 29.6:

Petitioner herein:

BE&K Construction Company. ("BE&K").

Respondents herein:

National Labor Relations Board ("NLRB")

Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Local 302, International Brotherhood of Electrical Workers, AFL-CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Contra Costa County Building And Construction Trades Council, AFL-CIO and Northern California District Council Of Laborers, Laborers International Union Of North America, AFL-CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement

Masons International Association, AFL-CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO.

(hereinafter the "Respondent Unions" or the "Unions")

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....i
LIST OF INTERESTED PARTIES.....ii
TABLE OF AUTHORITIES.....v
OPINIONS BELOW.....1
JURISDICTION.....1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE.....1
STATEMENT OF THE CASE.....2
SUMMARY OF ARGUMENT.....12
ARGUMENT.....14

I. The Sixth Circuit's Order Creates An Unwarranted Bifurcated First Amendment Standard Contrary To Holdings Of This Court.....14

II. The Erroneous Bifurcated Standard Created By The NLRB And The Sixth Circuit Operates To Chill Employers' First Amendment Rights And Its Unique Application To The NLRA Is Unjustified.....26

III. BE&K's Suit Was Unquestionably Filed With "Probable Cause" And Was Not "Objectively Baseless".....29

CONCLUSION.....35

TABLE OF AUTHORITIES

CASES

BE&K Construction Co. v. NLRB, 246 F. 3d 619 (6th Cir. 2001).....*passim*
BE&K Construction Co., 329 NLRB No. 68 (Sept. 30, 1999).....*passim*
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).....*passim*
Braum Elec. Co., Inc., 324 NLRB 1 (1997).....21
Brownsville Golden Age Nursing Home v. Wells, 839 F. 2d 155 (3d Cir. 1988).....18
Bruce v. City of Gainesville, 177 F.3d 949 (11th Cir. 1999).....21
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).....8,12,15,17,25,33
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).....19
Clyde Talyor Co., 127 NLRB 103 (1960).....27
Coon v. Grenier, 867 F.2d 73 (1st Cir. 1989).....20
Diamond Walnut Growers, Inc. v. NLRB, 53 F. 3d 1085 (9th Cir. 1995).....22,24
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).....15
Eaton v. Newport Board of Educ., 975 F. 2d 292 (6th Cir. 1992).....18
Evers v. County of Cluster, 745 F. 2d 1196 (9th Cir. 1984).18
Gen Probe, Inc. v. Amoco Corp., Inc., 926 F. Supp. 948 (S.D. Cal. 1996).....18
Herr v. Pequea Township, 274 F. 3d 109 (3d Cir. 2001).....18
INVST Fin. Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391 (6th Cir. 1987).....28
Jones v. United States, 613 F. Supp. 1311(5th Cir. 1980).....19
Keegel v. Key West & Caribbean Trading Co., Inc., 627 F.2d 372 (D.C. Cir. 1980).....20
McDonald v. Smith, 472 U.S. 479 (1985).....14
McEnany v. West Delaware County Comm. Sch. Dist.,

844 F. Supp. 523 (N.D. Iowa 1994) 29
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)..18
NLRB v. Vanguard Tours, Inc., 981 F. 2d 62 (2d Cir. 1992) 21,34
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)..... 32
Petition of General Motors Corp., 182 N.E.2d 815 (Mass. 1962)..... 30
Petrochem Insulation, Inc., 330 NLRB No. 10 (1999)..... 21
Petrochem Insulation, Inc. v. NLRB, 240 F. 3d 26 (D.C. Cir. 2001)..... 24
Power Systems, 229 NLRB 445 (1978), enf. den., 601 F. 2d 936 (7th Cir. 1979)..... 28
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)..... *passim*
Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942)..... 28
Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners, 456 U.S. 717 (1982) 28
Tame T.I.C., Case No. 27-CB-826, 827 (1993) 14,34
Thompson v. American Home Assur. Co., 95 F.3d 429 (6th Cir. 1996) 20
United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217(1967) 15
United Mine Workers v. Pennington, 381 U.S. 657 (1965)..... 14
USS-Posco Indus. v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO, 31 F. 3d 800 (9th Cir. 1994).... 1
USS-POSCO, 692 F. Supp. 1166 (N.D. Cal. 1988) 4
USS-POSCO, 721 F. Supp. 239 (N.D. Cal. 1988) 5
USS-POSCO, 134 LRRM 2590 (N.D. Cal. 1990) 6
USS-POSCO, No. C87-4829 DLJ (Feb. 11, 1992)(final judgment)..... 6
Vendo Co. v. Lekto-Veńd Corp., 433 U.S. 623 (1977)..... 19
Video Int. Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F. 2d 1075 (5th Cir. 1988)....18
We, Inc. v. City of Philadelphia, 174 F. 3d 322 (3d Cir. 1999)..... 18

White v. Lee, 227 F. 3d 1214 (9th Cir. 2000)..... 22,23,24

STATUTES

15 U.S.C. 1, 2 5,14
15 U.S.C. 15, 26..... 5
28 U.S.C. 1254(1)..... 1
29 U.S.C. 157..... 9
29 U.S.C. 158(a)(1)..... 8,16
29 U.S.C. 187..... 4

OTHER

Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 Cal. L. Rev. 757, 764-800 (1992)..... 5,34
Herbert R. Northrup, *Corporate Campaigns: A Perversion of the Regulatory Process*, 17 J. Lab. Res. 345 (1996)..... 2

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit as to which the writ has been granted is reported as *BE&K Construction Co. v. NLRB*, 246 F. 3d 619 (6th Cir. 2001), rehearing en banc den. (June 28, 2001) (J.A. 1a). That decision enforced an Order of the National Labor Relations Board reported as *BE&K Construction Co.*, 329 NLRB No. 68 (Sept. 30, 1999) (J.A. 28a). A related decision of the Court of Appeals for the Ninth Circuit is reported as *USS-POSCO Indus. v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO*, 31 F. 3d 800 (9th Cir. 1994)(the "USS-POSCO" action)(J.A. 62).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Rehearing en banc was denied by the court of appeals on June 28, 2001 (J.A. 26a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, First Amendment

15 U.S.C. § 1, et seq

29 U.S.C. § 157

29 U.S.C. § 158(a)(1)

29 U.S.C. § 158(b)(4)

29 U.S.C. § 160 (c)

29 U.S.C. §187.

STATEMENT OF THE CASE

This Petition arises from the Sixth Circuit's denial of Petitioner's appeal from an Order of the NLRB. The NLRB action, in turn, arose from litigation commenced by BE&K and USS-POSCO Industries ("UPI") in response to a protracted corporate campaign[1] of litigation and other secondary pressure tactics waged by the Respondent Unions against the Petitioner during the late 1980s. *USS-POSCO, supra, 31 F. 3d 800.*

A. The UPI Contract And The Unions' Corporate Campaign.

In the late 1980's USX Corporation and Pohang Iron and Steel Co. of South Korea formed UPI as a joint venture to modernize and operate an aging steel mill in Pittsburg, California (the "PITCAL" mill). UPI awarded a construction contract to BE&K, a construction company whose employees had chosen to remain non-union.

After the award, the Unions, who did not represent any of BE&K's employees, announced a goal of making an example of PITCAL and eliminating non-union construction in Northern

[1] As used here, the term "corporate campaign" refers to an effort by a labor union to apply pressure tactics against competition from non-union employers outside the representational procedures governed by the NLRA. *See* Herbert R. Northrup, *Corporate Campaigns: A Perversion of the Regulatory Process*, 17 J. Lab. Res. 345 (1996). Such campaigns typically do not rely on the support of the employees of the affected employer, and may include violence, regulatory permit challenges, litigation and other forms of pressure tactics outside the coverage of the NLRA.

California. The Unions thereafter fought UPI, BE&K and BE&K's joint venture partner Eichleay Constructors ("Eichleay") at every turn. As summarized by the Sixth Circuit (J.A. 4a), the Unions:

> [A]dvocated the adoption and enforcement of a toxic waste emission standard for the construction project, even though the labor groups had no genuine concern that the modernization of the steel mill would be environmentally harmful; picketed and hand-billed at BE&K's premises without disclosing the nature of their disagreement with the company and encouraged employees of subcontractors to engage in a strike at the project; filed a civil action in California state court, *Piledrivers, Divers, Bridge Wharf & Dock Builders Union Local 34, AFL-CIO, et al. v. USSPOSCO Indus., Inc., et al.*, alleging among other things, violations of California's Health and Safety Code in an effort to delay the modernization project and increase costs; and initiated contract grievances against Eichleay ... under collective bargaining agreements that did not apply to Eichleay.

It is undisputed that 14 of the Unions' 29 separate lawsuits and arbitration proceedings failed to achieve any positive relief whatsoever. *USS-POSCO*, 31 F.3d at 811 & 811 n.9 (J.A. 78). In October 1987, the NLRB's General Counsel brought a complaint against one of the unions, later settled, asserting that

at least one aspect of the campaign against BE&K constituted an unfair labor practice. 4/18/96 Richard Leasia Aff. at 3, ¶ 8; (J.A. 89).

B. The USS-POSCO Action.

In September 1987, BE&K and UPI brought suit against the Unions, pleading that the Unions' actions violated Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, by engaging in: (1) wrongful political and lobbying activities, including advocacy of a toxic waste ordinance without any genuine belief that the project would harm the environment; (2) illegal picketing and handbilling at the site, fomenting violence, and inciting subcontractor employees to engage in a strike; (3) filing the *Piledrivers* suit and other litigation in bad faith ; and (4) wrongfully bringing collective bargaining grievance and arbitration actions against Eichleay(J.A. 5a).

The unions eventually moved to dismiss or for partial summary judgment on the Section 303 claims, claiming that their lobbying efforts, the *Piledrivers* suit, and the *Eichleay* actions were protected First Amendment activities under the *Noerr-Pennington* doctrine. *See USS-POSCO*, 692 F. Supp. 1166, 1168-69 (N.D. Cal. 1988); 7/29/88 Memorandum and Order, (J.A.16); *USS-POSCO*, 31 F.3d at 804 (J.A. 63-64). The district court agreed in part, concluding that certain of these union activities were constitutionally protected attempts to petition the government and did not fall under the sham exception to *Noerr-Pennington*. 7/29/98 Memorandum and Order (J. A. 19-21).

BE&K and UPI amended their complaint in October 1988, asserting that the unions' campaign violated Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. § 1, 2. Plaintiffs subsequently amended their complaint in May 1989 to assert violations of the Clayton Act, 15 U.S.C. § 15, 26. Prior to making these claims, BE&K and UPI consulted national antitrust and labor law experts, who advised them that, while a matter of first impression, BE&K and UPI had viable claims as a matter of law. 4/18/96 Leasia Affidavit at ¶ 9, (J.A. 87). Independent legal scholars, who wrote in a leading law review that the plaintiffs could assert antitrust claims against the unions, subsequently buttressed BE&K's and UPI's contentions. *Id.* at ¶ 10, (J.A. 88), Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 Cal. L. Rev. 757, 764-800 (1992).

Nevertheless, the district court applied *Noerr-Pennington* to bar BE&K's new antitrust allegations against the Unions to the extent that the allegations addressed conduct previously dismissed by the court. The court also dismissed certain related Section 303 claims. *USS-POSCO*, 721 F. Supp. 239, 241-42 (N.D. Cal. 1988); 5/1/89 Order, (J.A. 25-26)[2] UPI

---

2 The district court entered Rule 11 sanctions against BE&K, solely for repleading previously dismissed claims. 10/2/89 Order Awarding Attorney's Fees, (J.A. 38). This order was later reversed on appeal. *USS-POSCO*, 31 F.3d at 812 (J.A. 79-80). The unions filed numerous other motions for sanctions in the district court arguing that BE&K's claims lacked a reasonable basis. 4/18/96 Leasia Aff. at ¶¶ 12-13, (J.A. 88). All of those substantive motions were denied by the district court. *Id.*

voluntarily dismissed its own claims in March 1990. (3/27/90 Ex Parte Motion for Voluntary Dismissal).

Some antitrust claims still remained for resolution. In June 1990, the district court limited discovery with respect to these claims. The court permitted BE&K to inquire only into whether the unions had conspired with BE&K's competitors. *USS-POSCO*, 134 LRRM 2590, 2594 (N.D. Cal. 1990) (June 8, 1990 Order) (J.A 52-53). Following discovery, the unions moved for summary judgment, which BE&K did not oppose in view of the court's previous rulings. 9/5/91 Order at 2, (J.A. 57). By stipulation, BE&K voluntarily dismissed two remaining claims (*e.g.*, the allegation of instigating violence) under Section 303 of the LMRA, and the court entered final judgment in favor of the unions in February 1992. (J.A. 58). The court awarded fees and costs as the sanction for repleading prior claims. BE&K appealed the antitrust and sanctions decisions to the Ninth Circuit.

C. The Ninth Circuit Decision

While ultimately affirming the district court's judgment against BE&K, The Ninth Circuit's decision reversed the district court's legal analysis and agreed with many of BE&K's contentions. *See USS-POSCO*, 31 F.3d at 810 (J.A. 75-77). In particular, the Ninth Circuit concluded that, but for the fact that the Unions had been successful on a slight majority of their claims, much of the Union activity alleged in BE&K's complaints would not have been protected from the antitrust laws. *Id.*

The Ninth Circuit ruled for BE&K in rejecting the district court's conjunctive test requiring proof of

both an illegal conspiracy with non-labor groups and an illegitimate purpose in the combination. *Id.* at 809-10. The Court of Appeals therefore held that the district court had erred in denying BE&K discovery as to the second prong, illegitimate purpose. *Id.* at 810. The Ninth Circuit ultimately affirmed the district court's judgment because it found the error harmless in light of the Unions' *Noerr-Pennington* defense. *Id.* at 810-11, 812 (J.A. 75-80).[3]

The Ninth Circuit held that the Unions' partial success rate in just over half (15 of 29) of their lawsuits – "a batting average exceeding .500" as the court described the record – "forecloses any possibility that BE&K could substantiate its claim." *Id.* The court reasoned that "[t]he fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.* The court therefore affirmed the grant of summary judgment on the antitrust counterclaim.

The Ninth Circuit nonetheless ruled in BE&K's favor with respect to overturning the district court's sanction of fees for the entire district court litigation. The Ninth Circuit further rejected the Unions' request for sanctions arising out of BE&K's appeal. In reviewing BE&K's allegations, the Court of Appeals confirmed that they were reasonable under

---

[3] An irony of this case is that the Unions defended their actions in the Ninth Circuit by relying on the "objectively baseless" standard of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, 508 U.S. 49 (1993).* Now that BE&K's litigation is challenged, the unions claim that *Professional Real Estate* does not apply, as is further explained below.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), "and, if proven, would be sufficient to overcome the unions' *Noerr-Pennington* defense." *Id.* at 811 (J.A. 78-79).[4]

After the Ninth Circuit decision issued, counsel for the ***Unions*** issued a sworn declaration expressing "great concerns" over the outcome. Benson Decl. at ¶ 2 (J.A. 82).

D. The NLRB Proceedings.

One year after the Ninth Circuit decision, on October 18, 1995, the General Counsel of the NLRB filed a complaint against BE&K, claiming that BE&K had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by bringing and prosecuting the *USS-POSCO* action against the Unions. The General Counsel further sought an order that BE&K reimburse the Unions for the attorneys' fees and costs they had incurred in defending against BE&K's suit. The Unions intervened on the side of the General Counsel. Both sides filed cross-motions for summary judgment with the NLRB.

In support of its motion for summary judgment, BE&K presented undisputed evidence of the objective basis of its actions. BE&K's counsel

---

[4] The Unions' argument for sanctions was based on the notion that *California Motor Transport*, the primary authority underlying BE&K's original claims, had been overruled by *Professional Real Estate Investors*. The Ninth Circuit squarely rejected that argument, holding instead that *California Transport* was reaffirmed by *Professional Real Estate*. The Court of Appeals therefore refused to sanction BE&K, stating pointedly with regard to the unions' arguments, "We obviously disagree." *USS-POSCO*, 31 F.3d at 811 n.10 (J.A. 79).

confirmed by affidavit that the Company had acted upon legal advice that its claims were reasonable as well as advice that it had a significant chance of prevailing in the *USS-POSCO* action, especially in the Ninth Circuit, where counsel believed that BE&K had "a strong chance of success." 4/18/96 Richard Leasia Affidavit at ¶ 10 (J.A. 88).

Counsel further explained that during the course of the proceedings, the Division of Advice of the General Counsel of the NLRB had recommended that a complaint be issued against a union that had engaged in conduct which, in counsel's view, was indistinguishable from the campaign at issue in the *USS-POSCO* action. *See id.* at ¶11, (J.A. 88).

BE&K's counsel's affidavit also explained the context of the dispute, noting that the unions had no representational status and that "[m]ost if not all" of the union activities had unlawful secondary objectives and had been accompanied "by acts of violence and threats." 4/18/96 Richard Leasia Affidavit at ¶ 4 (J.A. 86). For that and other reasons, BE&K's counsel's affidavit in support of BE&K's motion for summary judgment affirmed that the company had a "reasonably held belief" that the unions' conduct was unprotected by Section 7 of the NLRA, and he expressly denied any retaliatory motives. *Id.*, ¶ 3, (J.A. 86).

More than three years later, on September 30, 1999, a three-member panel of the NLRB issued a decision and order in favor of the General Counsel. 329 NLRB No. 68 ((J.A. 28a). Purporting to apply the Supreme Court's test in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 749 (1983) that "it is an unfair labor practice to prosecute an

unmeritorious lawsuit for a retaliatory purpose," the Board interpreted the Supreme Court's use of the term "meritorious" to require only a determination of whether BE&K had prevailed in the underlying litigation. *Id.* at 6 (J.A. 44a-45a). Because the unions had successfully defeated BE&K's Section 303 and antitrust claims by obtaining summary judgment, the Board concluded that those claims "were unmeritorious within the meaning *of Bill Johnson's*." *Id.* at 6, (J.A. 46a-47a). As for the claims that BE&K had voluntarily dismissed (the allegations of violence, work stoppages, and unlawful picketing at the site), the NLRB held that "the withdrawal of a claim could be regarded as equivalent to an [sic] showing that it lacks merit," again relying upon *Bill Johnson's*. *Id.* at 7, (J.A. 49a) (quoting 461 U.S. at 747). The Board expressly refused to consider any of BE&K's proffered evidence of good faith and reasonable basis for bringing and prosecuting the litigation. (J.A. 60a).

After finding that BE&K had violated § 8(a)(1) of the NLRA by suing the Unions, the NLRB ordered BE&K to pay an award of all legal fees and expenses incurred by the unions in defending against the *USS-POSCO* action. *Id.* at 11-12, (J.A. 65a).[5]

F. The Sixth Circuit's Decision

On April 9, 2001, the U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decision. *See BE&K Construction Co. v. NLRB*, 246 F. 2d 619 (6th Cir. 2001) (J.A. 1a). The court held that dicta in

[5] In addition, though it was undisputed that BE&K committed no unfair labor practices against its own employees, the Board ordered that the Company mail compliance notices to its employees and even former employees on the project. *Id.*

this Court's decision in *Bill Johnson's*, *supra*, justified the NLRB's application of a bifurcated First Amendment standard for protecting the right of access to the courts under the National Labor Relations Act, a standard that differs from the standard set forth by this Court more recently in *Professional Real Estate*, *supra*.

The court of appeals stated that "[t]he mere failure of the company to prevail on its claims against the union in regular judicial proceedings was sufficient to strip BE&K of some of its First Amendment protection because of the company's prior opportunity to avail itself of a judicial forum for redress of its grievances." *Id.* at 628-29 (J.A. 18a).

The court of appeals specifically rejected application of this Court's decision in *Professional Real Estate*. Instead, the Sixth Circuit articulated the following bifurcated analysis to determine the First Amendment protections to be afforded an employer for filing a retaliatory lawsuit against employees and/or unions:

> Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, there is no longer a need to prevent interference with the First Amendment right to seek judicial redress. At that point, the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives.

Id. at 629 (J.A. 19a). This Court granted BE&K's Petition for Writ of Certiorari challenging the Sixth Circuit's holding, on January 4, 2002.

SUMMARY OF ARGUMENT

The First Amendment protects the right to seek redress in the courts under the petition clause. From *Noerr-Pennington* to *Professional Real Estate*, this Court has consistently held that petitioning is protected where the petition is not "objectively baseless." This Court has applied the "objectively baseless" standard not only under the antitrust laws, but also in many other contexts, including under the NLRA with respect to pending litigation.

In the present case, the NLRB and the Sixth Circuit have articulated an unwarranted "completed case" labor law exception to this Court's consistent application of the *Noerr-Pennington* doctrine. The consistency of this Court's decisions both before and after *Bill Johnson's*, however, belies the claim that the Court intended in *Bill Johnson's* to create two separate Constitutional standards – one standard for the period before a court has reached a final decision on the merits of the employer's underlying case and another standard once the case has been decided.

This Court's holding in *Professional Real Estate* should have clarified any misunderstanding that might have arisen out of the *Bill Johnson's* opinion. No exception to the consistent decisional standard first announced in *Noerr-Pennington* is now justified.

The bifurcated standard adopted by the NLRB and enforced by the Sixth Circuit is both unfair and untenable as a guideline for behavior. The new bifurcated standard plainly chills employers' rights to petition the courts, since it is impossible for employers to know in advance how litigation will be resolved, and therefore, impossible to avoid committing an unfair labor practice except by not going to court in the first instance. There is no principled basis for applying a different First Amendment standard to completed litigation under the NLRA than this Court has already declared should apply to ongoing litigation under that statute. A uniform standard is particularly compelled where the lawsuit at issue is filed pursuant to a federal statute having equal standing with the NLRA, such as the antitrust laws or the Labor Management Relations Act.

In the present case, BE&K's suit was unquestionably filed with "probable cause," and was not "objectively baseless." As a result, the Court should reverse the court of appeals and should deny enforcement of the NLRB's Order against BE&K.

ARGUMENT

I. The NLRB's Order Creates An Unwarranted Bifurcated First Amendment Standard Contrary To Holdings Of This Court.

This case is the culmination of a series of NLRB and court decisions that have created a dangerous anomaly in the law threatening the entire business community's right of access to the courts on labor issues. By upholding the NLRB's unfair labor practice finding against BE&K and the award of attorneys fees to the Unions, the Sixth Circuit has grossly distorted the holding of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). As a result, the court of appeals has undercut vital First Amendment protections which this Court has found to be paramount in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), and related cases.

This Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). "[E]xcept in the most extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions...'" *McDonald v. Smith*, 472 U.S. 479, 486 (1985) (Brennan, J., concurring).

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court first recognized that those who exercise their First Amendment right to petition the government for redress deserve immunity from statutory liability. In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), this Court affirmed the doctrine of immunity previously expressed in *Noerr*. Both *Noerr* and *Pennington* arose in the context of the Sherman Act. The *Noerr-Pennington* doctrine withheld immunity where the petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor." *Noerr*, *supra*, at 144.

In *California Motor Transport Co., Inc. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court extended the *Noerr-Pennington* doctrine to protect the right of citizens to bring actions before administrative agencies and in the courts. The Court held that such actions were immunized by the First Amendment from statutory liability, unless they were mere "shams," *i.e.*, objectively baseless.

In *Bill Johnson's Restaurants v NLRB, supra, 461 U.S. 731 (1983)*, the Court made clear that the same First Amendment principles applied to litigation challenged under the National Labor Relations Act. Expressly citing *California Motor Transport*, the Court held that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." 461 U.S. at 748.

The Court explicitly recognized in *Bill Johnson's* that the same First Amendment

considerations are present when a party claims that a lawsuit violates the NLRA as are present when a party claims that a lawsuit violates the Sherman Act:

> In *California Motor Transport* ... we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anti-competitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes .... ***We should be sensitive to these First Amendment values in construing the NLRA in the present context.***

Bill Johnson's, *supra*, at 741 (emphasis added).

In *dicta*, the *Bill Johnson's* Court briefly opined that "[I]f judgment goes against the employer or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case...." *Id.* at 747. However, the Court nowhere addressed in *Bill Johnson's* the First Amendment standard that should apply to such post-judgment unfair labor practice cases.

Subsequently, in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508

U.S. 49 (1993), the Court clarified the standard for protecting litigants' rights under the First Amendment in the context of completed litigation. Far from viewing the "objectively baseless" formulation as creating any sort of inconsistency with the previously decided *Bill Johnson's* holding, the Court in *Professional Real Estate* expressly cited *Bill Johnson's* as one of many antecedent authorities that supported the announced rule:

> Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component .... Whether applying *Noerr* as an antitrust doctrine ***or invoking it in other contexts***, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham .... Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's*, 461 U.S. at 743-44.

Id. at 58-59 (emphasis added).

Since *Professional Real Estate Investors*, it should thus be clear that "whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts," a lawsuit is protected by the First Amendment from statutory liability unless it is "objectively baseless."

The Court's First Amendment standard has been broadly and uniformly applied in every imaginable context, in accordance with the Court's holding.[4]

Among the many examples of such uniform application of *Noerr-Pennington* outside the antitrust field are *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil conspiracy claim); *Herr v. Pequea Township*, 274 F.3d 109 (3d Cir. 2001) (claim arising under substantive due process clause); *Eaton v. Newport Board of Educ.*, 975 F.2d 292 (6th Cir. 1992) (federal civil rights cause of action); *Brownsville Golden Age Nursing Home v. Wells*, 839 F.2d 155 (3d Cir. 1988) (state law tort actions); *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, (5th Cir. 1988) (federal civil rights cause of action); *Evers v. County of Cluster*, 745 F.2d 1196 (9th Cir. 1984) (same).

As this Court further explained in *Professional Real Estate*, "objectively baseless" and "non-meritorious" are synonymous terms which both mean that "no reasonable litigant could realistically expect success on the merits" at the time a suit is filed. The Court expressly applied the phrase "meritorious litigation" to refer to cases that were not successful but nonetheless had a minimal level of merit, *i.e.*, cases with "genuine [legal] substance" or "valid claims." *See* 508 U.S. at 55 n.3.

---

[4] *See We, Inc. v. City of* Philadelphia, 174 F.3d 322, 327 (3rd Cir. 1999) ("The purpose of *Noerr-Pennington* as applied in areas outside the antitrust field is the protection of the right to petition."); *Gen Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 956 (S.D. Cal. 1996) ("*Noerr*[*-Pennington*] immunity bars any claim, federal or state, common law or statutory, that has as its gravamen constitutionally protected petitioning activity.").

The Court also acknowledged prior authority that a "successful" lawsuit was not necessarily measured by whether it ultimately prevailed in court, but, rather, whether it constituted a reasonable or genuine effort to invoke the judicial process: "a successful lawsuit [i]s a 'genuine attemp[t] to use the ... adjudicative process legitimately' rather than 'a pattern of baseless, repetitive claims'") (quoting *Vendo Co. v. Lekto-Vend Corp.*, 433 U.S. 623, 645 (1977) (Blackmun, J., concurring)). Thus, this Court expressly noted that even when the defendant has lost, "a court must 'resist the understandable temptation to engage in *post hoc* reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" 508 U.S. at 60 n.5

The *Professional Real Estate* Court further relied on the prior holding in *Christiansburg Garment v. EEOC*, 434 U.S. 412, 421-22 (1978), that an award of attorneys fees against an unsuccessful plaintiff under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, was permissible only when the completed action was found to have been "meritless."[7] Again, the Court defined "meritless" in its *Christiansburg* decision as "unreasonable or without foundation," the

---

[7] *See also Bruce v. City of Gainesville*, 177 F.3d 949, 951 (11th Cir. 1999) (Title VII action is not "meritless" for purposes of assessing attorney fees simply because plaintiff lost the case; case must be groundless or without foundation); *Jones v. United States*, 613 F. Supp. 1311, 1314, n.10 (5th Cir. 1980) ("meritless" suit warranting fees under civil rights act means "groundless or without foundation," rather than simply that the party "ultimately lost its case").

same standard reaffirmed by the Court in *Professional Real Estate, 508 U.S. at 60, n.5.*[8]

Finally, in *Bill Johnson's* itself, this Court made clear that it was adhering to the well accepted definition of "meritorious," described above, in the following statement:

> Although it is not unlawful under the Act to prosecute a ***meritorious*** action, the same is not true of suits based on insubstantial claims – suits that lack, to use the term coined by the Board, a "***reasonable basis.***" Such suits are not within the scope of First Amendment protection.

461 U.S. at 743 (emphasis added).

It is well established then, that this Court's use of the term "meritorious," both before and after *Bill Johnson's,* and even within the *Bill Johnson's opinion,* is consistent with the "objectively baseless" standard set forth in *Professional Real Estate* and advocated by BE&K in the present case. Notwithstanding the clearly expressed intention of the Court to establish a uniform First Amendment

---

[8] Similarly, courts have uniformly held that the default judgment vacatur requirement of establishing a "meritorious defense" means that "the defendant must state 'a defense good at law' which is sufficient if it contains 'even a hint of a suggestion which, proven at trial, would constitute a complete defense.'" *Thompson v. American Home Assur. Co.*, 95 F.3d 429, 434 (6th Cir. 1996); *accord, Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 373 (D.C. Cir. 1980). *See also Coon v. Grenier*, 867 F.2d 73, 77 (1st Cir. 1989) ("meritorious defense" exists if allegations plausibly suggest existence of facts which, if proven at trial, would be a cognizable defense).

standard immunizing all but "objectively baseless" lawsuits, however, the NLRB and the Sixth Circuit have misapplied the *Bill Johnson's* dicta to carve out a wholly unwarranted exception from *Professional Real Estate Investors. See BE&K Construction Co.*, 329 NLRB No. 68 (1999) (J.A. 43a – 44a).; *see also Petrochem Insulation, Inc.*, 330 NLRB No. 10, *10-11 (1999); *Braum Elec. Co., Inc.*, 324 NLRB 1 (1997).

The *Bill Johnson's dicta* regarding completed litigation does not, as the Board and the Sixth Circuit seem to believe, relieve the NLRB of the duty to find an employer's suit to be non-meritorious within the judicially accepted meaning of that term. The *Bill Johnson's* Court said only that, upon a finding that such litigation was "without merit," the Board "may" proceed to adjudicate the unfair labor practice case. 461 U.S. at 744. Having already referred to "meritorious" suits as meaning those that are "reasonably based," *Id.* at 743, in accordance with its well settled definition of the term, the Court's *dicta* does not support creation of an entirely new First Amendment standard. The NLRB's and Sixth Circuit's interpretation of *Bill Johnson's* should therefore be rejected.

Several other courts of appeals have rejected or questioned the NLRB's reading of *Bill Johnson's*. In *NLRB v Vanguard Tours, Inc.*, 981 F. 2d 62 (2d Cir. 1992), the Second Circuit declined to accept the Board's method of determining lack of "merit" in the case of a withdrawn lawsuit (for which the test of merit under *Bill Johnson's* is listed in the same category as a judicially determined judgment). The *Vanguard* court held:

> Because the Board ***did not find that Vanguard's suit lacked a reasonable basis in fact or law***, either at the outset or at the point when the employer briefly permitted it to remain pending, the Board's determination that the lawsuit was an unfair labor practice ***may not be sustained***.

Id. at 66 (emphasis added).

Two other courts of appeals considering this issue have raised serious questions about the bifurcated standard created by the NLRB's interpretation of the *Bill Johnson's dicta*, in light of the subsequent holding in *Professional Real Estate*. Both courts ultimately upheld the NLRB's position, but both called upon this Court to clarify this critically important anomaly in the law.

In *White v. Lee*, 227 F. 3d 1214 (9th Cir. 2000), a case decided under the Fair Housing Act, the court was nevertheless called upon to address the apparent conflict created by the two Supreme Court decisions. The court declared that, but for a prior holding by another circuit panel in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085, 1088 (9th Cir. 1995), the court would "ordinarily be tempted to treat these statements in *Bill Johnson's* as *dicta*, because they were not pertinent to the case before the Court and because in *Professional Real Estate Investors*, decided ten years later, the Court did not even mention the *Bill Johnson's* statements when holding that unsuccessful lawsuits receive the traditional protection described in *California Motor Transport*, specifically including the requirement of objective

baselessness." *See White v. Lee, supra*, 227 F. 3d at 1235-36.

The *White* court reemphasized this point in its footnote 18, as follows:

> Particularly notable is the fact that in *Professional Real Estate Investors*, the Court cited the holding in *Bill Johnson's* that "by analogy to *Noerr's* sham exception, . . . even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" 508 U.S. at 59. However, rather than applying or even citing the subsequent *Bill Johnson's* statements regarding unsuccessful lawsuits, the Court emphasized that a litigant's failure to prevail did *not* establish the objective baselessness of his suit, and it proceeded to apply *Noerr-Pennington* immunity to an action that had in fact been defeated on summary judgment. Had the Court believed that the statements in *Bill Johnson's* had any effect, we would expect that it would have explained why it did not apply them in the case before it. The fact that the Court did not do so indicates that it considered the statements.dicta.

White v. Lee, supra, 227 F. 3d at 1235, n.18.

More recently, while upholding another NLRB decision relying on *Bill Johnson's* in the face of *Professional Real Estate*, the Court of Appeals for the D.C. Circuit expressed significant reservations over the substantial limits on First Amendment protections caused by the Board's view of the law. The D.C. Circuit strongly suggested that this Court should take up and clarify the differing standards. *Petrochem Insulation, Inc. v. NLRB*, 240 F. 3d 26, 32 (D.C. Cir. 2001).

The confusion reflected in these cases, and in the Sixth Circuit's holding in the present case, is the product of a misapplication of *Bill Johnson's*. The point of the *Bill Johnson's* holding was not to change the substantive standards applicable to different phases of litigation, but simply to establish different *procedures* for the NLRB to follow in the two types of situations. This Court held that the Board should not normally adjudicate litigation-related unfair labor practice charges at all while the lawsuits remained ongoing; but "once the employer has had his day in court," the Board *could* proceed to such adjudication. Nowhere did this Court say that a different substantive standard should apply during that subsequent unfair labor practice adjudication.

The view expressed by the Sixth Circuit and the NLRB, and by some other courts on this point,[5] makes no sense. In order to accept the Sixth Circuit's analysis, one would have to accept that this Court has departed from its long held notions of providing First Amendment protections for all but "nonmeritorious" litigation, and has defined that term everywhere else

[5] *See Diamond Walnut Growers v. NLRB, supra*, 53 F. 3d at 1088

as meaning "objectively baseless;" that the Court *sub silentio* completely changed its standard in one narrow category of cases under the NLRA; and that the Court has failed in subsequent decisions to acknowledge any such change. This Court's own statements, in both *Bill Johnson's* itself and in *Professional Real Estate*, to the effect that labor and antitrust laws should be interpreted *in pari materia* vis-à-vis the First Amendment, utterly belie the interpretations of the Sixth Circuit and the NLRB.

In any event, regardless of what confusion might have existed as a result of the dicta in *Bill Johnson's*, this Court's decision *in Professional Real Estate* resolved any prior ambiguities. This is particularly clear when the language of *Professional Real Estate* is read in tandem with the references to *California Motor Transport* contained in the *Bill Johnson's* opinion. The Court has now established a uniform system for balancing First Amendment considerations of access to the courts with other federal statutory interests such as labor or antitrust law. In the face of this continuum of case law, the Sixth Circuit and the NLRB must be found to have erred in their interpretation of *Bill Johnson's*, and their decisions should be set aside. Alternatively, to the extent that *Bill Johnson's* is read as somehow supporting the NLRB's Order in this case, then that portion of the Court's opinion must be deemed to have been overruled or superceded by *Professional Real Estate*, and should be clearly disavowed by this Court now. Properly construed in light of *Professional Real Estate*, *Bill Johnson's* should have precluded the Board here from making a per se finding of "meritlessness" without examining the objective reasonableness of BE&K's claims.

II. The Erroneous Bifurcated Standard Created By The NLRB And The Sixth Circuit Operates To Chill Employers' First Amendment Rights, And Its Unique Application To The NLRA Is Unjustified.

The bifurcated standard applied by the NLRB and enforced by the Sixth Circuit is both unfair and untenable as a guideline for behavior because it is impossible for employers to know in advance how litigation will be resolved. It is therefore also impossible for them to avoid committing an unfair labor practice except by not going to court in the first instance. Certainty of outcome, however, should not be the test by which an employer evaluates instituting a potential lawsuit. As Justice Stevens stated in concurrence with the majority opinion in *Professional Real Estate*, "uncertainty about the possible resolution of unsettled questions of law is characteristic of the adversary process. Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek ... advantage in a doubtful case." *Professional Real Estate*, *supra*, at 69 (Stevens, J. concurring).

Faced with the requirement of divination at the outset of a case, many employers will undoubtedly forego exercise of their rights to avoid incurring statutory liability for having predicted wrongly. Application of the bifurcated standard applied by the Board and enforced by the Sixth Circuit improperly puts employers at risk of violating the law. In addition, such a rule would stagnate the development of the law, as employers with innovative legal theories would be deterred from bringing these

novel theories to court and risking liability under the NLRA.

The Respondents have argued that "different accommodations" are called for under the antitrust laws and under the NLRA to reflect that there are "distinct statutory schemes, with different purposes and remedies." (Union Opp. to Pet. for Cert. at 8, n.7). According to the Unions, the NLRB's stricter standard for reviewing completed litigation is needed to protect associational rights of employees from the potential chilling effect of a lawsuit.

These arguments do not justify the bifurcated standard that the NLRB has created. Indeed, the NLRB made such arguments in claiming the right to intervene in ongoing litigation in *Bill Johnson's, and this Court rejected them in that context.* Whatever chilling effect litigation has upon employee rights, it is surely no greater when the litigation is over and the employees (or in this case the non-employee unions) have won their case. At that point, there is actually *less* need for the NLRB to find the completed lawsuit to be an unfair labor practice, unless the suit is found to be objectively baseless.

The Respondents' arguments also ignore the "checkered" history of the NLRB's treatment of employer litigation cited in *Bill Johnson's*, 461 U.S. at 737. There was certainly no deeply rooted tradition at the Board, prior to *Bill Johnson's*, of finding reasonably based employer litigation to be unlawful or of distinguishing between pending suits and completed actions with regard to the standard of review. For nearly two decades, beginning with *Clyde Taylor Co.*, 127 NLRB 103, 109 (1960), the NLRB applied to all litigation, whether ongoing or

completed, a standard substantially similar to this Court's *Bill Johnson's/Professional Real Estate* test. Even when the NLRB adopted a more intrusive standard of review in *Power Systems*, 229 NLRB 445 (1978), the Board did not apply that standard differently to ongoing, as opposed to complete, employer lawsuits.

The *Power Systems* standard was in place at the Board for only five years prior to *Bill Johnson's*, and the *Power Systems* decision itself was denied enforcement by the Seventh Circuit, 601 F. 2d 936 (7th Cir. 1979). Meanwhile, the body of NLRB case law which has developed since the issuance of *Bill Johnson's* has been premised entirely upon the Board's misreading of the language of this Court. The NLRB has established no basis in the NLRA itself for creating a bifurcated First Amendment standard of review for employer litigation.

Finally, the Respondents' position also ignores the well settled requirement that the NLRB is under a duty to accommodate its statutory scheme to other equally important Congressional objectives. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). Here, Congress has determined under both the Antitrust laws and the Labor Management Relations Act that employers should be permitted to file objectively based litigation to effectuate the policies of those laws, without fear of being found to have violated the law upon an unsuccessful result. *Professional Real Estate Investors, supra*; *see also Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982) (barring award of attorneys fees to prevailing party under Section 303 of the LMRA).

Thus, the First Amendment, the *Professional Real Estate Investors* decision, and common sense all dictate that the NLRB be required to judge completed litigation under the uniform "objective basis" test applicable in all other contexts. This result is particularly compelled where the lawsuit at issue is filed pursuant to a federal statute having equal standing with the NLRA, such as the antitrust laws or the Labor Management Relations Act.

III. BE&K's Suit Was Unquestionably Filed With "Probable Cause" And Was Not "Objectively Baseless."

As noted above, the Sixth Circuit accepted the Board's determination that BE&K's claims were without merit under the Board's erroneous bifurcated standard, merely because BE&K lost some of its claims on summary judgment, and otherwise withdrew others with prejudice. BE&K's claims, however, easily meet the standards of a meritorious claim articulated by this Court in *Professional Real Estate*, and the decisions of the NLRB and the court of appeals must be set aside.

At the outset, the Board and the Sixth Circuit ignored the many aspects of the Ninth Circuit's holding as to which BE&K *prevailed*. The *USS-POSCO* court agreed with BE&K's basic antitrust theories and further agreed that a *pattern* of litigation is to be judged by a different standard than a single filing. The court of appeals further held that the Unions' activity was not per se exempt from challenge under the antitrust laws, and that BE&K had a reasonable basis for its litigation. Clearly, the

Ninth Circuit's rulings were not a complete repudiation of BE&K's theories, nor a complete victory for the unions.

It must also be recalled that ***the sole stated reason*** for the Ninth Circuit's failure to rule completely in BE&K's favor was that "more than half of all the [union] actions as to which we know the result (15 out of 29 by the Court's count) turn out to have merit." This, the Ninth Circuit believed, could not be reconciled with BE&K's charge that the unions were filing lawsuits "willy-nilly without regard to success." 31 F.3d at 811 (J.A. 78-79).[6] At the time BE&K filed its initial and amended complaints, however, the final count of successful vs. unsuccessful union actions was neither known nor knowable to it, and BE&K had every reason to believe that many of the suits that were then pending would be decided adversely to the unions.

It thus appears from the Ninth Circuit's decision that very slight differences in the ultimate disposition of some of the unions' lawsuits would have resulted in a total victory for BE&K. To now hold, as the Sixth Circuit would do – and with all the benefits of hindsight – that BE&K's lawsuit was without merit merely because it "lost" would be tantamount to requiring BE&K to predict both a union's success ***and*** its own before it could exercise its constitutional right to petition the courts.

---

[6] The Ninth Circuit easily could have counted the actions differently, in that many of the 15 "successful" union actions listed by the *USS-POSCO* court (all against Eichleay) should have been treated as consolidated, or fewer, actions.

Moreover, after the Ninth Circuit decision issued, counsel for the ***Unions*** issued a sworn declaration expressing "great concerns" over the outcome. Benson Decl. at ¶ 2 (J.A. 82). Among the Unions' concerns was that BE&K's Ninth Circuit "loss" had a significant positive precedential value for BE&K, establishing that unions may not engage in a pattern or practice of successive filings with the government against a non-union contractor, without regard to the merits of the filings, essentially for purposes of harassment. In other words, in certain important aspects of the litigation, BE&K's claims not only had "merit" but actually resulted in positive legal rulings which, in significant respects, made BE&K the prevailing party.[7]

As this Court has also observed, even where a party's claims do not present a material dispute of fact sufficient to require a trial, they may still present a good faith dispute over the law, and how the law will apply to and resolve the otherwise undisputed facts. *Professional Real Estate*, *supra* 508 U.S. at 64. The mere fact that a party loses a summary judgment motion, or an appeal therefrom, is not in and of itself, probative of whether the party's action was "reasonably based," brought with "objective good faith," or otherwise "genuinely" sought relief. A party may lose a summary judgment simply because a court disagrees with its interpretation of the law, or its

---

[7] Of course, BE&K does not deny that the district court's judgment in favor of the Unions' was ultimately affirmed by the Ninth Circuit. It is unnecessary for this Court to find that BE&K "prevailed" in any sense in its suit against the Unions in order to reverse the NLRB's unfair labor practice Order. The point being made here is simply that the outcome in the Ninth Circuit was far closer than the NLRB was willing to acknowledge, and clearly supports a finding that BE&K's litigation was "reasonably based," not "objectively baseless."

"objectively good faith argument for the extension, modification or reversal of existing law. " *Id.* at 65 (citing Fed. Rule Civ. P. 11).[8]

In close or novel cases, a party is often not able to determine before filing whether its arguments will be accepted. Because of this inherent uncertainty, as this Court recognized, it is unreasonable to penalize the litigant who brings an "objectively reasonable" claim simply because a court finally disagrees with its view of the law or the facts. Similarly, it would be unreasonable to penalize a litigant merely for having withdrawn a claim voluntarily, particularly where, as here, that claim is withdrawn for a specific, strategic purpose.[9]

In the present case, putting the final outcome aside, numerous facts support the contention that BE&K's claims were far from "objectively baseless." At the time the BE&K action was first filed, and during its pendency, a large and respectable body of authority held that a series of repetitive civil and administrative filings, even though partially successful, was not irrebuttably immune from challenge as a sham. *See Otter Tail Power Company v. United States*, 410 U.S. 366, 380 (1973); *California Motor Transport*, *supra*, at 513; *and cases cited at Professional Real Estate*, *supra*, at 55 n. 3. Thus, on the theory that the unions' litigation was by-and-large

---

[8] Indeed, if the Board's interpretation of *Bill Johnson's* were to prevail, even a filing appropriate under Rule 11 would nonetheless be subject to sanctions before the NLRB if it did not prevail.

[9] As noted in the Ninth Circuit's opinion, BE&K voluntarily dismissed with prejudice other potentially viable counts of its complaint (for example, those concerning violence) in order to obtain a review of the district court's antitrust rulings. *USS-POSCO*, *supra*, at 805.

a sham, BE&K reasonably believed that it *could* point to the unions' litigation as being unlawfully "coercive" under the Act.

There were likewise ample grounds for amending BE&K's complaint to include antitrust claims. In the course of this litigation the employers collected literally dozens – perhaps hundreds – of documents in which the union representatives openly expressed concern regarding their loss of "market share," and extolling the efficacy of their harassing, "government petitioning" tactics in reversing the trend. The head of the San Francisco Building Trades Council was quoted (from a letter he wrote to the heads of other area building trades councils) as vowing to "eliminate" non-union competition from the Bay Area through these and other tactics. Throughout the course of the entire dispute, the unions, their representatives and lawyers made little effort to conceal that their real motive was to drive non-union contractors out of the market.

Apart from these candid admissions of an "anti-competitive" objective, there then existed abundant authority for the proposition that a pattern of sham petitioning designed to drive competitors from a market by using the sheer burdens of the litigation itself was actionable in antitrust. BE&K had only to look to the long line of *Noerr-Pennington* sham cases for encouragement. BE&K's counsel were no strangers to these antitrust principles. Its then-lead counsel had successfully prosecuted three significant antitrust cases on sham theories.

In one of the many ironies surrounding this case, furthermore, the legal theory underlying the Section 303 claims that BE&K's voluntarily

dismissed[10] subsequently was endorsed by the Board itself in 1993. In *TAME T.I.C. & United Association of Journeymen, etc. of the Plumbing and Pipefitting Industry, etc.* (*TAME*), Case No. 27-CC-826, 827 (1993), the Board's Division of Advice recommended going to complaint against various UA locals (including one of the unions here) on virtually the same theories as were first asserted by BE&K in its Section 303 action. The Board not only went to complaint in the *TAME* matter, but the unions settled the matter rather than defend their actions before the NLRB. Surely, these actions by the NLRB's General Counsel demonstrate an "objective basis" for BE&K's identical claim.

As further noted above, BE&K filed its case only after intensive review and advice from national experts in the antitrust and labor fields. Indeed, independent commentators agreed with BE&K's assessment of the merits of its claims. *See* Durie & Lemley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 CAL. L. REV. 757 (1992). While the authors' view did not ultimately prevail, it is certainly indicative of whether a "reasonable litigant could realistically expect success on the merits."

To summarize, the Unions here embarked upon an obvious program intended to exploit the coercive effect of litigation and regulatory petitioning in an attempt to get UPI to cease doing business with

---

10 The NLRB reflexively relied on BE&K's voluntary dismissal of these claims to find that they too were nonmeritorious. (J.A. 48a-49a). As noted above, the Second Circuit has rejected any such presumption. *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 65 (2d Cir. 1992).

BE&K. The law confronting BE&K as it tried to respond to the Unions' novel strategy was, and to some extent remains, unclear, particularly as it relates to the *Noerr-Pennington* doctrine and its sham exception. Under *Professional Real Estate*, it can hardly be said that "no reasonable litigant could have realistically expected to secure favorable relief" on the claims BE&K brought. Accordingly, it cannot be said that those claims were "baseless," and the NLRB could not have made such a finding under the properly applied Professional Real Estate/Bill Johnson's standard.

CONCLUSION

In *Professional Real Estate*, this Court stated that "whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts," a lawsuit is protected by the First Amendment from statutory liability unless it is "objectively baseless." As this Court further explained, "objectively baseless" means that "no reasonable litigant could realistically expect success on the merits" at the time a suit is filed. In the present case, BE&K's claims were unquestionably founded on "probable cause" and were not, therefore, "objectively baseless."

The NLRB and the Sixth Circuit erred in holding that under *Bill Johnson's*, the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate*. The Sixth Circuit's reading of *Bill Johnson's* conflicts with *Professional Real Estate* and infringes on the constitutional rights of

employers. For all of the reasons stated herein, BE&K respectfully requests that this Court reverse the decision of the Sixth Circuit and deny the enforcement of the NLRB's Order against BE&K.

Respectfully submitted,

Maurice Baskin
Counsel of Record for Petitioner
Karen Vossler
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800